INTERIOR BOARD OF INDIAN APPEALS

Walch Logging Co., Inc., and Dant & Russell, Inc. v. Assistant Area Director (Economic Development), Portland Area Office, Bureau of Indian Affairs

11 IBIA 85 (03/18/1983)

Also published at 90 Interior Decisions 88

Reconsideration denied:
12 IBIA 126

# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203


WALCH LOGGING CO., INC.

DANT & RUSSELL, INC.

v.

ASSISTANT AREA DIRECTOR (ECONOMIC DEVELOPMENT),

PORTLAND AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 82-48-A Decided March 18, 1983

Appeals from determinations of liability for damages and of the amount of damages for breach of two timber logging contracts on the Makah Indian Reservation in Washington State.

Affirmed in part, modified in part, reversed in part, and remanded.

1. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

   The mitigation of damages resulting from the breach of an Indian timber sale contract is ordinarily best accomplished through a resale of the remaining timber on terms approximating those of the original contract.

2. Administrative Procedure: Administrative Review--Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

   Decisions made by officials of the Bureau of Indian Affairs as supervisors of Indian leases will be upheld when they are reasonable and based upon substantial

evidence in the record. Where the Board finds that BIA has calculated damages improperly or in violation of contractual or regulatory requirements, the agency's action will be set aside.

3. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

Standard Provision B6.12 of the standard Bureau of Indian Affairs Indian timber sale contract applies when a cutting deficiency incurred in one contract term is cured by cutting during a subsequent term or terms.

4. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

In calculating damages for breach of an Indian timber sale contract, it is reasonable to apportion the amount of timber required to be cut evenly over the term or terms during which logging was to have occurred.

5. Indian Lards: Forestry: Timber Sales Contract: Breach and Damages

In calculating damages for anticipatory breach of an Indian timber sale contract, it is proper to determine market value at the time or times set for performance through the date of trial.

6. Evidence: Presumptions--Evidence: Sufficiency

A legal presumption of regularity supports the official acts of public officers acting in their official capacities.

7. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

Expenses incurred in the expectation that an Indian timber sale contract might be breached are not recoverable.

8. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

   Expenses incurred in order to resell timber remaining after the breach of an Indian timber sale contract are recoverable.

9. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

   Recovery of reasonable administrative costs incurred by the Bureau of Indian Affairs as a direct result of the breach of an Indian timber sale contract will be allowed.

10. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

    The language of Standard Provision B2.7 of the standard Bureau of Indian Affairs Indian timber sale contract, to the effect that "any costs or expenses" incurred because of a breach of contract are recoverable, will be interpreted in accordance with the general rules governing the determination of damages unless it is shown that all parties accepted a broader interpretation of the language.

11. Evidence: Generally

    The true nature of the relationship between apparently separate business entities is a question of fact.

APPEARANCES: Craig A. Ritchie, Esq., Doherty, Doherty & Ritchie, Port Angeles, Washington, for Walch Logging Co., Inc.; Ronald T. Adams, Esq., Black, Helterline, Beck & Rappleyea, Portland, Oregon, for Dant & Russell, Inc.; Alvin J. Ziontz, Esq., Samuel J. Stiltner, Esq., and Frank R. Jozwiak, Esq., Ziontz, Pirtle, Morisset, Ernstoff & Chestnut, Seattle and Neah Bay, Washington, for the Makah Tribe; Michael E. Drais, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon,

for the Assistant Area Director (Economic Development). Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

This appeal was brought by Walch Logging Company, Inc. (Walch), and Dant & Russell, Inc. (Dant) (appellants), from an October 30, 1981, decision of the Assistant Area Director (Economic Development), 1/ Portland Area Office, Bureau of Indian Affairs (BIA) (appellee). That decision found that appellants were liable to the Makah Tribe and to BIA for damages in the amount of $3,690,563.80 for breach of two logging contracts covering logging units on the Makah Reservation in Washington State. These contracts were entered into pursuant to 25 U.S.C. § 407 (1976) and 25 CFR Part 163 (formerly Part 141; see 47 FR 13,327 (Mar. 30, 1982)). Appellants' appeals of that decision to the Deputy Assistant Secretary--Indian Affairs (Operations) were transferred to the Board of Indian Appeals for decision on July 2, 1982.

Background

On April 7, 1978, the Makah Tribe entered into logging contract No. 14-20-0510-316 with V.V.P., Inc. (VVP), covering a unit of the tribe's reservation designated as the Cape Flattery Logging Unit (Cape Flattery)

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1/ In its opening brief, Walch erroneously attributes this decision to the individual who prepared the damage figures. See Appeal of Walch Logging, Inc., Feb. 1, 1982 ("Opening Brief"), throughout, but especially at 1, 46-48.

(Doc. #58). 2/ Before any logging activity was commenced, VVP initiated the assignment of its rights under the contract to Walch on September 21, 1978. This assignment was approved by BIA on December 6, 1978 (Doc. #72), following the issuance to Walch of Performance Bond No. U-076568 in the amount of $123,000 by United Pacific Insurance Company (UP) on November 11, 1978 (Doc. #70).

Under the terms of this contract, Walch was required to log a minimum of 3 million board feet of timber by January 31, 1979, and thereafter to cut and scale a minimum of 6 million and a maximum of 12 million board feet each contract year (February 1 through January 31) through January 31, 1983 (Doc. #51). According to appellee and undisputed by appellants, Walch's actual performance during contract year 1978 resulted in a deficiency of 139,570 board feet. During the first quarter of 1979 Walch cut 2,326,210 board feet, of which 139,570 board feet were allocated to cover the 1978 deficiency as provided in Standard Provision B6.12 of the contract. 3/ A total of 2,186,640 board feet were consequently allocated to the first quarter of 1979. Walch removed its men and equipment from the Cape Flattery site in April 1979 and did not return. 4/

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2/ All references to document numbers ("Doc. #") are to documents found in the administrative record compiled by BIA. Some of these documents appear as exhibits to Walch's opening brief with different numbers. This decision will reference duplicate documents only by the numbers appearing in the compilation of documents prepared by BIA.

3/ This contract clause is quoted and discussed in the Discussion and Conclusions section, infra.

4/ Appellee's Answer Brief ("Answer Brief") at 37-39; Doc. #219. Since the contract required a minimum cut of 6 million board feet in 1979, Walch concluded the year with a deficiency of 3,813,360 board feet (Answer brief at 37-39; Doc. #219).

After Walch left the Cape Flattery site, it was BIA's position that several contract violations existed (Doc. #242). By letter dated June 15, 1979, the Superintendent of the Western Washington Agency gave Walch 10 days in which to inform the agency of its intentions with regard to the contract (Doc. #251). On June 22, 1979, Walch informed the Superintendent that it intended to perform the contract if it could obtain a modification or if the market conditions improved. Walch stated that it would submit a revised logging plan within 3 weeks (Doc. #254). When a revised plan was not submitted, appellee informed Walch on July 17, 1979, that it was in breach of the Cape Flattery contract and that all rights under the contract were revoked (Doc. #261).

Walch exercised its appeal rights as outlined in the July 17, 1979, letter in an undated letter received by BIA on August 24, 1979. Walch alleged surprise at being informed that BIA had declared the contract breached, reciting regular contacts with BIA regarding modification of the contract, stated that it fully intended to perform the contract, and disputed that any breach had occurred (Doc. #271). Following discussions on the status of the contract, on October 4, 1979, appellee wrote Walch, stating:

> We have held in abeyance any further action on your appeal because of the discussions being pursued between yourself and the Makah Tribe. Should your efforts to resolve this matter with the Tribe fail, or should negotiations not proceed in a timely manner, the appeal will be re-activated by letter from this office. This will provide a new date from which to calculate the 30-day time period in which you may file your appeal.

(Doc. #284). 5/ Efforts to negotiate a resolution were unsuccessful and, by letter dated February 7, 1980, appellee advised Walch that the appeal had been reactivated (Doc. #325).

Contemporaneously with the execution of the Cape Flattery contract, on September 8, 1978, the tribe entered into a second logging contract, No. P10C14200356, with VVP covering the Bear Creek Logging Unit (Bear Creek) (Doc. #1055). VVP sought to assign its rights under this contract to Walch on September 21, 1978. Performance Bond No. U-076566 in the amount of $90,000 was issued to Walch by UP on November 11, 1978 (Doc. #1068). The assignment was approved by BIA on December 6, 1978 (Doc. #1070).

Under the Bear Creek contract, Walch was required to log a minimum of 2 million board feet by January 31, 1979, and thereafter to cut and scale a minimum of 6 million and a maximum of 12 million board feet each contract year (February 1 through January 31) through September 30, 1981 (Doc. #1048). Despite some logging during 1978, an undisputed deficiency of 795,830 board feet existed at the end of the contract year. Again, Walch removed its men and equipment from the site in April 1979 and did not return. 6/

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5/ The Board has previously noted that BIA decisions are not always couched in legal or judicial terminology although they are determinations in an administrative appellate proceeding. See United States v. Aberdeen Acting Area Director and Celina Young Bear Mossette, 9 IBIA 151, 153 n.1, 89 I.D. 49, 50-51 n.1 (1982). In this case, the Superintendent reconsidered the initial determination that the Cape Flattery contract had been breached following Walch's appeal and reinstated Walch's rights under that contract pending the outcome of negotiations with the tribe.

6/ Appellee states that by the end of 1979 Walch was in deficit on this contract by 6,498,690 board feet. Since the Bear Creek contract also required a minimum cut of 6 million board feet during 1979, Walch apparently logged 1,204,170 board feet during 1978 and 297,140 board feet during 1979.

As was also the case on the Cape Flattery unit, BIA believed that several contract violations existed at the Bear Creek site. The BIA informed Walch of the nature of these alleged violations by letter dated May 9, 1979 (Doc. #1237). Unlike the situation with the Cape Flattery unit, BIA did not formally declare Walch to be in breach of the Bear Creek contract until February 7, 1980 (Doc. #1295).

Walch appealed the February 7, 1980, decision that it was in breach of the Bear Creek contract and that the Cape Flattery appeal was reactivated to the Deputy Assistant Secretary--Indian Affairs (Operations) on March 7, 1980 (Doc. #316, #1305). On May 9, 1980, the Acting Deputy Assistant Secretary required Walch to post appeal bonds in the amounts of $600,000 for the Cape Flattery unit and $150,000 for the Bear Creek unit (Doc. #336, #1323). These bonds were intended to protect the tribe's interests pending appeal. When Walch failed to post the required bonds, the appeal was dismissed on June 5, 1980 (Doc. #340, #1327). The decision that Walch was in breach of the two contracts is a final decision of the Department and has not been disputed in this case.

In his dismissal of the appeal on the issue of breach, the Acting Deputy Assistant Secretary directed BIA immediately to resell the timber covered by the two contracts. The BIA divided the timber into two groups for purposes of resale. The first group was timber already felled but not removed from

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fn. 6 (continued)
Under section B6.12, the amount logged in 1979 was applied against the 1978 deficiency, leaving a deficiency of 498,690 board feet for 1978 in addition to a deficiency of the total minimum cut of 6 million board feet for 1979 (Doc. #1211).

the sites. The felled timber was in danger of immediate deterioration if not removed expeditiously. Under the authority of 25 CFR Part 163, BIA had initiated attempts to resell this timber on April 10, 1980, prior to the Acting Deputy Assistant Secretary's June 5 dismissal (Doc. #328, #1316). The resales of felled timber were designated Pickup One (timber on the Bear Creek unit) and Pickup Two (timber on the Cape Flattery unit).

The BIA first attempted to resell the felled timber at the rates in effect under the initial contracts. No bids were received on this advertisement by the May 6, 1980, bid date. A second attempt to resell was made using a reappraised rate consistent with the then current Industrial Forestry Association (IFA) rates for the Puget Sound area. Again, no bids were received by the bid date of April 23, 1980. On the third resale attempt, a bid was received on June 24, 1980, and was accepted by BIA on September 12, 1980 (Doc. #105, #1102).

The BIA began attempts to resell the standing timber on June 10, 1980. These resales were designated Cape Flattery 2 and Bear Creek 2. The initial advertisements of these units were made on terms similar to those of the original contracts, revised to reflect the first quarter 1980 IFA Puget Sound log values. When no bids were received by the August 25, 1980, bid date, representatives of BIA and the tribe met with prospective purchasers to determine what would constitute an acceptable advertisement. As a result of these meetings, the contract offer was substantially revised and readvertised. One satisfactory bid was received on September 18, 1980, and was accepted by BIA on October 23, 1980 (Doc. #125, #1122).

On July 7, 1980, BIA made demand upon UP, Walch's insurer, for payment in full of the $123,000 performance bond for the Cape Flattery unit and of the $90,000 performance bond for the Bear Creek unit (Doc. #343, #1330). Following a request for further information and a meeting with BIA, UP initially rejected the demand until preliminary demand for payment was made upon Walch (Doc. #345, #1332). Because of this response, BIA provided further documentation of damages to Walch, UP, and Dant 7/ on September 17, 1980 (Doc. #352, #1339).

On January 30, 1981, BIA demanded payment of damages from Walch. This initial demand stated that the preliminary calculation of damages was for $1,391,709.15 on the Cape Flattery unit and for $681,370.57 on the Bear Creek unit (Doc. #362, #1349). These figures were discussed at a meeting between BIA and UP on April 1, 1981. Although invited, neither Walch nor Dant attended this meeting. Revised damage calculations after this meeting were $927,842.09 on the Cape Flattery unit and $654,366.25 on the Bear Creek unit (Doc. #377, #1364). After the meeting, UP tendered payment in full of the $123,000 bond on the Cape Flattery unit and of $82,015.44 of the $90,000 bond on the Bear Creek unit (Doc. #384, #1371).

By letter dated May 22, 1981, UP requested BIA to delay cashing the tendered checks because Walch and Dant had requested an opportunity to discuss the damage issue with BIA (Doc. #385, #1372). Either during or after a May 27, 1981, meeting with all interested parties present, UP, Walch, and

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7/ The extent of Dant's liability for damages is one of the issues raised in this appeal. The nature of Dant's involvement with these contracts is discussed in the Discussion and Conclusions portion of this decision, infra.

Dant each presented alternative methods of calculating damages. The BIA considered these alternatives and other suggested changes and, on June 18, 1981, proposed final settlement damage figures of $888,258.20 on the Cape Flattery unit and of $1,171,655.73 on the Bear Creek unit (Doc. #394, #1381).

A final settlement meeting was held on July 31, 1981. When BIA received no settlement offers that it considered realistic, settlement efforts were discontinued (Doc. #417, #1404).

In August 1981, UP filed a complaint for interpleader and declaratory relief with the United States District Court for the District of Oregon and tendered payment of the two performance bonds, in the amount of $213,000 to the registry of the court. United Pacific Ins. Co. v. United States, et al., Civ. No. CV 81-746 (D. Or., filed Aug. 14, 1981) (Doc. #2500). On November 13, 1981, the court ordered that, upon deposit of the funds, UP would be exonerated and released from all of its obligations and liabilities as surety (Doc. #2501). On April 1, 1982, the court stayed its proceeding pending a final Departmental decision on the issue of damages (Doc. #2507).

Following the decision to discontinue settlement attempts, BIA began a systematic review of all preliminary damage calculations. This review included an update of costs and expenses incurred by the tribe and BIA from October 1980, when the initial calculation was made, to October 1981 when final demand was made. The final determination of damages was set forth in the October 30, 1981, letter to Walch and Dant from which the present appeals were taken. That letter showed damages of $1,532,322.43 on the Cape Flattery

unit and of $2,158,241.37 on the Bear Creek unit. This letter for the first time informed Dant that BIA considered it fully liable as a principal for the entire amount of damages (Doc. #435, #439, #1421, #1425).

Appeals were filed by Walch and Dant from this decision to the Deputy Assistant Secretary on November 27, 1981 (Doc. #457, #459, #1433, #1435). All parties filed briefs on appeal. On July 2, 1982, the case was transferred to the Board of Indian Appeals pursuant to 25 CFR 2.19(a)(2). In the transmittal memorandum, the Acting Deputy Assistant Secretary indicated that an evidentiary hearing might be required in this case. Therefore, in its July 12, 1982, notice of docketing, the Board requested the parties to inform it whether they believed an evidentiary hearing should be conducted. Based on the negative responses of all parties, the Board determined not to order a hearing at that time and, on August 13, 1982, established a simultaneous briefing schedule for the submission of any additional arguments. Both Walch and Dant filed additional briefs in response to this order.

By letter dated September 30, 1982, the Makah Tribe requested oral argument. On October 5, 1982, the Board issued an order giving other interested parties until October 13, 1982, to respond to the motion. Appellee concurred in the tribe's request and Dant opposed oral argument. Based on these responses the Board initially determined to grant oral argument and requested counsel for appellee to determine an acceptable date.

On October 21, 1982, the Board received a letter dated October 18, 1982, from Walch, also opposing oral argument. In view of the then substantial

opposition to oral argument, the Board reconsidered its decision to grant oral argument and undertook a more extensive review of the administrative record. Based on this review, the Board determined that it would attempt to reach a decision without oral argument. By order dated October 28, 1982, the Board denied oral argument, while reserving its options to order an evidentiary hearing, further briefing, or oral argument at a later time should it become apparent that such supplementary procedures were necessary.

## Issues on Appeal

The briefs of the parties indicate that the following questions are at issue:

1. Did BIA and the tribe properly mitigate damages?

2. Did BIA correctly compute the depreciation in the value of the timber covered by the breached contracts?

3. Are the costs of mistletoe control, planting, stream cleanout, and road bank stabilization adequately substantiated?

4. Are administrative costs for BIA and the tribe in relation to the determination of breach, calculation of damages, and resale of the timber recoverable, and, if so, are they properly substantiated and reasonable?

5. May the tribe recover as damages lost interest and the cost of borrowed funds through December 31, 1983?

6. Is Dant liable as a principal for the full amount of damages?

## Discussion and Conclusions

1. Mitigation of Damages.

The construction of Federal contracts, including contracts approved on behalf of an Indian or Indian tribe by the Secretary of the Interior in his fiduciary capacity, is a question of Federal law. Federal contract law is governed by principles of general contract law. Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947); United States v. Humboldt Fir, Inc., 426 F. Supp. 292 (N.D. Calif. 1977), aff'd mem., 625 F.2d 330 (9th Cir. 1980). In the absence of Federal cases on point, state law may be used as an indication of the general common law. Humboldt Fir, Inc., supra.

The common law of contracts places a duty on the nonbreaching party to mitigate damages incurred as a result of a breach of contract. This common law principle is incorporated into the statutory and decisional law of the State of Washington. Wash. Rev. Code § 62 A.2-706 (1974); Kubista v. Romaine, 87 Wash.2d 62, 549 P.2d 491, 495 (1976). 8/

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8/ The Bear Creek and Cape Flattery contracts pertain to timber located on the Makah Indian Reservation in the State of Washington. Other circumstances also reveal that the State of Washington has the most significant relationship to these contracts. See Answer Brief at 27; Tribe's Answer Brief at 22.

The BIA attempted to mitigate damages in this case by reselling the timber covered by the contracts. The first advertisements were made on terms closely approximating those of the original contracts. Because these advertisements were not acceptable to prospective purchasers, no bids were received. Consequently, BIA was forced to readvertise, twice for felled timber and once for standing timber. Readvertisement resulted in a delay between the times when the contracts were breached and when new contracts were approved.

[1] Although it is now apparent that the timber market was rapidly deteriorating during this period, the Board declines to fault BIA for first attempting to resell the contracts on terms closely approximating the original terms. If such resales had been possible, they would ordinarily have been the best means for mitigating damages. 9/ The Board finds no violation of the duty to mitigate damages in the advertisement and acceptance of the resale contracts.

2. Computation of Depreciation in the Value of Timber.

On October 7, 1980, appellee instructed the BIA Portland Area Branch of Forestry to proceed with the calculation of damages incurred as a result of the breach of the two contracts. The memorandum requiring the calculation of damages stated:

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9/ Furthermore, the Board finds that the period between the determination of breach as to both contracts (Feb. 7, 1980) and the first advertisements for felled timber (Apr. 10, 1980) and for standing timber (June 10, 1980) was not unreasonable. See Opening Brief at 52-54.

> In order for us to make the claim for damages, w need a detailed assessment of damages incurred, in monetary terms, on both contracts.* * * [C]alculate the dollar value differences that would have been received between the original Cape Flattery and Bear Creek Logging Units and the resold Pickup One and Two Logging Units, regarding the felled timber, and the Cape Flattery 2 and Bear Creek 2 Logging Units, for standing timber. As a guide to determine monetary damages, make calculations based on the continued operations of the Cape Flattery and Bear Creek Logging Unit Contracts under the original contract terms. Estimates of damages for changed time periods of operation between the old and new contracts should be documented and listed carefully.

(Doc. #194). Following these instructions, damages were calculated and the approving officer issued the October 20, 1981, letter from which these appeals have been taken.

The first question that must be addressed in determining whether the approving officer's calculation of damages should be upheld is the standard of review. Appellee argues that his method must be upheld unless it is shown to have been based on "bad faith, or mistake so gross as to imply bad faith or the failure to exercise an honest judgment." Polley's Lumber Co. v. United States, 115 F.2d 751, 754 (9th Cir. 1940); see also United States v. Harris, 100 F.2d 268 (9th Cir. 1938); Answer Brief at 27-28. In the cases on which appellee relies, the Ninth Circuit Court of Appeals held that the approving officer's selection of the method for calculating damages and determination of the amount of damages were conclusive under the terms of the contracts and regulations at issue. Furthermore, the court declined to disturb those determinations on appeal even though it might have chosen a different methodology or reached a different damage figure if it had the responsibility to determine damages. Polley's, supra at 754.

Despite appellee's arguments, administrative review of the approving officer's determination, as distinct from judicial review, is governed by specific provisions of the contracts and by administrative review considerations, not by restraints placed upon review of a final decision of the Department by the Federal courts. Standard Provision B2.2 of the contracts states that "[t]he decision of the Approving Officer shall prevail in the interpretation of the contract, subject to the right of appeal prescribed in Section B2.11." Section B2.11 provides that "any action or decision taken by the Approving Officer or his superior officers" may be appealed in accordance with regulations set forth in 25 CFR Part 2. The regulations in 25 CFR Part 2 in turn reference the Board's procedural regulations in 43 CFR Part 4, Subpart D.

[2] The Board has held that BIA's actions as supervisor of Indian leases will be upheld when they are reasonable and based upon substantial evidence in the record. See Robert B. Wooding v. Portland Area Director, 9 IBIA 158 (1982); Fort Berthold Land & Livestock Association v. Aberdeen Area Director, 8 IBIA 230, 88 I.D. 315 (1981). Where the Board finds that the BIA has calculated damages improperly or in violation of contractual or regulatory requirements, the agency's action will be set aside. Jackson v. Anadarko Area Director, 4 IBIA 39, 82 I.D. 191 (1975). Cf. Isaac and Katherine Bonaparte v. Commissioner of Indian Affairs, 9 IBIA 115 (1981) (regarding improper cancellation of an Indian lease). The Board will apply the same standard of review in this case. 10/

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10/ The use of appellee's "bad faith" standard would effectively eliminate the Secretary's authority to review the decisions of his subordinates, as well as directly contravening the provisions of the contracts at issue.

The second and major issue is whether the approving officer properly determined the amount of damages. Under the methodology used, which appellee describes as "[i]n keeping with the general standard prevailing in this [the 9th] circuit," the approving officer calculated "the difference between the original contract price (labeled as 'anticipated proceeds') minus the resale price of timber remaining after breach (felled and standing)* * * [minus also] the money in advance deposit accounts and the value of timber logged * * * prior to breach" (Answer Brief at 30). This methodology necessitates the determination of (1) the original contract price, (2) the resale price of felled and standing timber, and (3) value received by the tribe under the original contracts before breach.

The first step in BIA's calculation of depreciation in value is the determination of the original contract prices established under the two contracts. This determination is complicated by the fact that both of the contracts were tied to the fluctuating IFA stumpage rate (Doc. #53-#55, #1050-#1052). Thus the price of timber cut during each quarter was not determined until the new stumpage rates were known. Consequently, BIA was faced with the problem of determining future values in a constantly changing market. The BIA was also required to make assumptions about when the minimum required cut of 6 million board feet per contract during each contract year after 1978 would be logged. Finally, the fact that each contract permitted the removal of up to 12 million board feet per contract year had to be ignored in the calculations because the question whether more than the required minimum cut would be logged was speculative. Any calculation made under these circumstances was at best an attempt to approximate the value of the contracts.

The first question concerning the methodology BIA employed in calculating the original contract price is whether Standard Provision B6.12 may be invoked for the period prior to breach. Section B6.12, which concerns damages resulting from failure to meet the minimum cutting requirements imposed by the contracts, states:

> If the Purchaser fails to meet the minimum cutting requirements * * * [t]he volume of timber scaled during the following contract year shall not be applied to the minimum requirements for that year until the existing deficiency has been made up. All timber scaled to correct a cutting deficiency shall be paid for at the stumpage rates in effect at the end of the contract year in which the deficiency occurred or at the rates in effect at the time of scaling, whichever are higher * * *. Normal stumpage rate procedures shall be applied at the start of the first monthly period subsequent to the monthly reporting period in which the deficiency is satisfied. [11/]

Walch argues that section B6.12 may not be used in calculating damages because once the contracts were breached, section B2.6 requires that all damages must be calculated in accordance with section B2.7, which states:

> In the event of failure to complete all obligations assumed under the contract, the Purchaser shall be liable for the depreciation in the value for the remaining timber and for any costs or expenses incurred by or caused to the Seller or the Government as a result of such failure, in an amount to be determined by the Approving Officer.

Because section B2.7 does not reference section B6.12, Walch contends that section B6.12 cannot be applied in the present damage calculation.

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11/ The sections of this provision relating to liquidated damages, which apply only if specifically provided for in the contract, are omitted as irrelevant to the present discussion.

Although sections B6.12 and B2.7 are apparently both standard provisions incorporated into many BIA timber sales contracts, no prior Departmental interpretations of either provision or of their interaction have been cited. 12/ Consequently, the Board must determine these issues as matters of first impression.

[3] Section B6.12 refers to a situation in which a cutting deficiency is later cured. The section fixes the stumpage rate to be applied when timber is actually scaled to correct a cutting deficiency, and defines the stumpage rates that will apply to subsequent cutting. Section B6.12 appears to anticipate that in a lengthy contract, such as those at issue, performance may be interrupted and minimum cutting requirements may not be satisfied by the purchaser without constituting breach as long as any deficiencies are eventually remedied.

Walch never cured its cutting deficiencies. Instead, BIA declared the contracts to be in breach. By its terms, section B6.12 cannot apply in this

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12/ Walch alleges that it attempted to get copies of several BIA documents, including the Bureau of Indian Affairs Manual (BIA manual), containing interpretations of the contract language. The BIA allegedly declined to produce any documents, stating in regard to the BIA manual that damage computations were based on the individual contracts and that the manual was not pertinent or related to such damage computations (Opening Brief at 5).

Walch argues that because BIA has not made its interpretations of these contract clauses known as required by 5 U.S.C. § 552 (1976), the interpretation advanced in this case cannot be used against Walch. See Morton v. Ruiz, 415 U.S. 199 (1974). The Board has previously held that BIA policy interpretations of general applicability will not be upheld when they contravene the provisions of 5 U.S.C. § 552. See Matthew Allen v. Navajo Area Director, 10 IBIA 146, 162-65, 89 I.D. 508, 516-l8 (1982); Shoshone and Arapaho Tribes v. Commissioner of Indian Affairs, 9 IBIA 263, 267-69, 89 I.D. 200, 202-03 (1982). In this case, however, the "interpretation" advanced is merely a construction of contract language made in the context of an adversary proceeding. The Board does not believe that a legal argument of this nature constitutes the type of general policy interpretation contemplated by section 552.

situation. Once the contracts were breached, all damages were subsumed under section B2.7. The BIA should, therefore, have calculated damages in accordance with section B2.7.

The primary question under section B2.7 is how to allocate the minimum cutting requirements imposed by the contracts over each contract year. In its calculations, BIA averaged the minimum cutting requirements over the four quarters of each contract year. On the Cape Flattery contract, BIA averaged the annual minimum cutting requirement of 6 million board feet per contract year in allocating 1,500,000 board feet to each quarter of contract years 1980, 1981, and 1982. The 1,500,000 board foot figure was multiplied by the IFA stumpage rates for each quarter during contract year 1980. For contract years 1981 and 1982, the stumpage rate was frozen at the rate in effect on October 23, 1980, the date the standing timber was resold (Doc. #219).

In contrast to the straight averaging undertaken for the Cape Flattery contract, for the reminder of the timber covered by the Bear Creek contract, BIA attributed 1,500,000 board feet to the first, second, and third quarters of contract year 1980; 1,600,000 board feet to the fourth quarter of contract year 1980 and to the first and second quarters of contract year 1981; and, finally, 1,405,000 board feet to the third quarter of contract year 1981, concluding the calculation at that point. The concluding point of this calculation seems intended to coincide with the final date for performance prescribed in the Bear Creek contract (September 30, 1981). The IFA stumpage rates were again allowed to fluctuate until the fourth quarter of contract year 1980, at

which time they were frozen following the resale of standing timber on October 23, 1980 (Doc. #1211).

Walch argues that averaging is improper and that the amount of timber which would be cut in each quarter must be determined after analysis of the IFA stumpage rates for the entire year. Thus, for example, Walch contends that all 6 million board feet required to be cut during contract year 1981 must be allocated to the third and fourth quarters of 1981 based upon the fluctuation of the stumpage rates (Opening Brief at 8-10). Walch considers these cutting schedules more "intelligent" and "informed" than the one used by BIA, and states that these schedules would be followed by a prudent purchaser (Opening Brief at 9). 13/

[4] The Board finds that BIA's apportionment of the minimum cutting requirement over the contract year is reasonable and, therefore, upholds that determination. 14/ It is possible with the benefit of hindsight to devise many formulations that would result in shifting the cutting requirement throughout the year to maximize the advantage either to Walch or to the tribe. The BIA chose a logical alternative that would share either a market loss or gain between Walch and the tribe.

Once it has chosen the method by which to determine the original contract prices, BIA should, as a matter of reasonableness, apply that method

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13/ Walch makes no factual allegation that it had the capacity to fulfill this schedule.

14/ The Board does not hold that this is the only method that could be used to determine the original contract price. It merely holds that this method is not unreasonable and is based upon substantial evidence in the record.

consistently in both contracts or offer an explanation for the deviation. It is clear that BIA averaged the minimum annual cut required under the Cape Flattery contract over the four quarters of each contract year. It is not clear how BIA reached either the total figures or the allocation among contract quarters used under the Bear Creek contract. The BIA attributed 6,100,000 board feet to contract year 1980 of the Bear Creek contract, and 4,605,000 board feet to contract year 1981. The breakdown of figures allocated to each quarter during these contract years was not reached through averaging. 15/ Because appellee failed consistently to average the Bear Creek minimum cutting requirement after the date of the resale contract, contrary to the approach taken in the Cape Flattery calculations, and failed to offer any reasonable explanation for such deviation, these figures must be adjusted and the original price under the Bear Creek contract recalculated.

Furthermore, because the Board has disapproved BIA's use of section B6.12 for determining damages resulting from Walch's failure to meet the minimum cutting requirements of both contracts for contract year 1979, these deficiencies should similarly be calculated in accordance with the method chosen to determine damages under section B2.7. In calculating damages prior to the determination of breach on the Cape Flattery contract, BIA found that, after subtracting the logging which took place during the first quarter of contract year 1979, a deficiency of 3,813,360 board feet existed for that year. The BIA averaged this deficiency over the remaining three quarters

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15/ The BIA states that it averaged the timber remaining under the Bear Creek contract until the date of the mitigation resale, Oct. 23, 1980 (Answer Brief at 58).

of the 1979 contract year. The resulting average of 1,271,120 board feet per quarter was multiplied by the fluctuating IFA stumpage rates during each of those three quarters (Doc. #219). This procedure is consistent with the Board's holding that the minimum cutting requirement may be averaged in determining the original contract price under section B2.7, and is therefore affirmed. 16/

In determining the original contract price for contract year 1979 on the Bear Creek unit, BIA attributed the entire deficiency for that year to the first quarter of contract year 1980. 17/ After subtracting the logging which took place during the first quarter of contract year 1979, a deficiency of 6,498,690 board feet existed at the end of the year on the Bear Creek contract (Doc. #1211). In accordance with the Board's holdings, this deficiency should be averaged over the remaining three quarters of contract year 1979 and the average multiplied by the IFA stumpage rates in effect during each of these quarters.

The final issue under the calculation of the original contract price is whether BIA properly used the IFA stumpage rate in effect when the standing timber was resold in determining damages for those quarters following

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16/ The BIA, however, used this method to determine damages for the Cape Flattery contract under section B6.12. Averaging is improper under that section, which, in requiring the use of the higher of the stumpage rates in effect when actual scaling takes place or at the end of the contract year in which the deficiency occurred, establishes when a cutting deficiency will be allocated and valued.

17/ This procedure would be an improper application of the language of section B6.12 if that section could properly have been used in this determination. The stumpage rate in effect during the last quarter of contract year 1979, rather than during the first quarter of contract year 1980, should have been used.

resale. Upon the determination of breach, BIA was faced with a difficult projection of the timber market. The decision to freeze the stumpage rates was reasonable at the time and could have served as the basis for a settlement. The Board declines to fault BIA's attempt to reach a fair calculation of damages and to avoid speculating about the timber market under the circumstances of these cases.

Walch argues, however, that the proper procedure for computing the depreciation in value for a contract which was breached before the date for performance is set forth in an October 23, 1933, memorandum of the Solicitor of the Interior entitled "Memorandum to Mr. Collier Re: Defiance Plateau Unit Timber Sale Contract" (Op. Sol., Vol. I at 376). In this memorandum, the Solicitor stated that the majority rule in Federal courts in regard to this situation is that "the breach should be treated as an anticipatory breach. The proper ruling, in view of the general purpose of damages, placing the damaged party in the same position he would have enjoyed in event of performance, would be that the market value should be determined as of the date or dates set for performance. Roehm v. Horst, [178 U.S. 1 (1900)]." Id. at 380. The Solicitor further stated that if this majority rule were adopted, in order "to establish the market value at the various future times set for performance, evidence of market values existing between the date of breach and the date of trial would be admissible." Id. at 380-81.

[5] The BIA's calculation was reasonable at the time it was made and under the circumstances described. It was, therefore, a proper basis for settlement. The Board, however, agrees with the reasoning in the cited

Solicitor's opinion and holds that, when a settlement is not reached and the case goes to trial, or in administrative review terms, is appealed to a higher Departmental official, damages for breach of a contract before the date set for performance should be determined under the rules relating to anticipatory breach.

In this case, the final cuts under the Bear Creek contract were to be completed by September 30, 1981, and under the Cape Flattery contract by January 31, 1983, both of which are prior to the date of trial (Departmental adjudication). Therefore, the original contract prices should be recalculated using the actual IFA stumpage rates in effect for those quarters between October 23, 1980 (the date of the resale contracts for standing timber used by BIA as the date to freeze the fluctuating IFA stumpage rate), and the dates set for final performance under the contracts.

In summary, the Board holds that Standard Provision B6.12 applies only when a contract has not been breached; that the minimum cutting requirement for each contract year after breach may be averaged over the contract year; that under the averaging method chosen by BIA, cutting deficiencies for contract year 1979 should also be averaged over the contract year and valued at the IFA stumpage rate for each quarter; and that the IFA stumpage rates should be allowed to fluctuate through the date set for performance or the date of decision, whichever comes first.

The second step in BIA's methodology for determining depreciation in value involves calculating the amounts realized or to be realized by the

Makah Tribe under the provisions of the four resale contracts, two for felled timber and two for standing timber. These calculations are simplified by the facts that the felled timber contracts have been completed and the standing timber contracts involved fixed stumpage rates.

With respect to the Cape Flattery unit, the tribe received $320,383.68 from the Pickup Two contract (felled timber). The tribe will also realize $3,586,473.22 as a result of the resale of standing timber (Cape Flattery 2) (Doc. #219). Thus, the tribe will recover $3,906,856.90 as a result of the resale of this logging unit (see also decision letter of Oct. 30, 1981).

The Pickup One resale contract for felled timber on the Bear Creek unit resulted in income of $49,290.12 for the tribe. The resale of standing timber (Bear Creek 2) will result in income of $3,994,278.75 (Doc. #1211). The resale of the Bear Creek logging unit will give the tribe $4,043,568.87 (see also Decision letter of Oct. 30, 1981).

The third and final step is the determination of the value of timber logged before breach and the amount of money in advance deposit accounts. There is apparently no dispute that these amounts were $745,705.08 and $37,675.42 for the Cape Flattery Unit and $264,752.36 and $67,914.08 for the Bear Creek unit.

Therefore, after redetermining the original contract prices under the two contracts in accordance with this decision, BIA must subtract $4,690,237.40 ($3,906,856.90 plus $745,705.08 plus $37,675.42) to determine depreciation in

value of timber on the Cape Flattery unit and $4,376,235.31 ($4,043,568.87 plus $264,752.36 plus $67,914.08) to determine depreciation in value of the timber on the Bear Creek unit.

3. Mistletoe Control, Planting, Stream Cleanout, and Road Bank Stabilization Costs.

The BIA determined that Walch was liable for $40,376.50 in regard to the Cape Flattery contract and $11,441 on the Bear Creek contract for mistletoe control, planting, stream protection, and road bank stabilization costs. Walch does not dispute that it was required to perform these operations under the contracts or that such expenses were generally included within Standard Provision B2.7. Instead, it alleges that these costs are not properly substantiated and that they were offset by increased revenues due to the resale of the two logging units.

[6] The BIA's calculation of these damages is set forth in a memorandum from the Acting Superintendent of the Olympic Peninsula Agency (Doc. #187). A legal presumption of regularity supports the official acts of public officers acting in their official capacities. Oglala Sioux Tribe v. Commissioner of Indian Affairs, 7 IBIA 188, 200, 86 I.D. 425, 431 (1979); see also Alan T. Trees, 66 IBLA 334 (1982). As applied to the Acting Superintendent's statement of the calculation of these damages, this presumption is sufficient to constitute prima facie evidence that the costs incurred by BIA were as stated.

In appeals brought to the Board under 25 CFR Part 2, the burden of proof is on an appellant to show that agency action complained of was erroneous or not supported by substantial evidence. Cheyenne-Arapaho Tribes of Western Oklahoma v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 54, 90 I.D.___(1983); Hazel Hawk Visser v. Portland Area Director, 7 IBIA 22 (1978). Walch has presented no evidence to support a conclusion that BIA did not incur the enumerated expenses in the amounts claimed. The mere statement that the costs are not properly substantiated is insufficient to overcome the prima facie showing that such costs were incurred.

Walch does not further develop its allegation that these costs were offset by increased revenues generated by the resale contracts. Even assuming this statement to be entirely true, the fact that the tribe could or did receive greater revenues under another contract does not excuse Walch from obligations accepted under its contract.

Therefore, the Board affirms BIA's determination of damages relating to mistletoe control, planting, stream protection, and road bank stabilization costs.

4. Administrative Costs Relating to Determination of Breach, Calculation of Damages, and Resale.

The BIA determined that certain administrative costs incurred by the Department and by the Makah Tribe were recoverable under Standard Provision B2.7. These costs amounted to $11,772.56 for the Cape Flattery contract and

$8,524.95 for the Bear Creek contract ($20,297.51 total) (Answer Brief at Doc. #218, #1210).

Walch argues that these expenses are generally unsubstantiated, unreasonable where substantiated, and in most cases constitute nonrecoverable "overhead expenses" (Opening Brief at 13-19). The BIA answers that these expenses are both substantiated and reasonable and their recovery was anticipated under Standard Provision B2.7 which provides for recovery of "any costs or expenses incurred by or caused to the Seller or the Government as a result of failure [to complete the obligations assumed under the contract]" (Answer Brief at 44-46 (emphasis added)).

The types of administrative expenses incurred by BIA and the tribe because of the breach fall into two general categories: (1) amounts paid to outside people or organizations to facilitate resale, and (2) expenses related to BIA personnel and equipment costs for time spent working on this matter. Each of these categories can further be broken down into periods before and after February 7, 1980, the date these contracts were finally declared to be breached.

[7] Any expenses incurred prior to February 7, 1980, are not recoverable because they did not result from the breach of the contracts. At most, such expenses were incurred in the expectation that the contracts would be breached. Therefore, the Board will disallow all expenses shown to have been incurred prior to breach.

[8] The BIA and the tribe are entitled to recover all reasonable amounts paid after February 7, 1980, to outside entities, including but not limited to accountants and newspapers, incurred because of the necessity to readvertise the two logging units. As previously stated, the recitation of these costs by a public official acting in his official capacity is sufficient to invoke the presumption of regularity and to establish a prima facie case that they were incurred in the amounts and for the purposes stated.

The Board has examined the statements of expenses paid to outside persons and disagrees with Walch's general allegation that the costs are unreasonable. Therefore, BIA and the tribe are entitled to recover the amounts paid to outside entities after February 7, 1980, as claimed.

The largest item of administrative expenses claimed by BIA is related to internal salary and equipment costs. These costs, usually termed overhead expenses, are, as Walch alleges, frequently not allowed as items of damage when the office would continue in operation and overhead expenses would be incurred without regard to the breach of any particular contract. See Boyajian v. United States, 423 F.2d 1231 (Ct. Cl. 1970).

[9] Under such an analysis, if BIA had been required to hire additional employees solely to deal with the breach of these contracts, such expenses would probably be recoverable, as long as the additional hiring did not violate BIA's duty to mitigate its damages. Instead, BIA used its own employees to do this additional work, causing them to spend time on these matters that could have been spent on other Governmental business. Walch cites no cases

denying recovery of overhead expenses incurred by the Federal Government under these circumstances.

It is the Board's conclusion that BIA's itemization of internal administrative costs incurred as a result of the breach of these contracts is not unreasonable and that appellants should have reasonably foreseen that their breach would produce added costs to the Government for such matters as administering resales of the remaining timber. The approving officer appears to have been conservative in his calculation of administrative costs by excluding, among other things, compensation for attorneys.

Therefore, after examination of the expenses claimed, the Board finds they are reasonable and recoverable. The BIA is entitled to recover the amounts paid for internal administrative costs.

5. Lost Interest and Interest Paid on Borrowed Funds.

By far the largest item of damages claimed is interest lost to the Makah Tribe through December 31, 1983, 18/ and interest paid on loans through September 30, 1980. These claimed damages amount to $1,055,477 for the Cape Flattery unit and $1,552,065 for the Bear Creek unit. These figures appear to represent interest lost on money allegedly taken out of investments and interest paid on commercial loans allegedly necessitated when the tribe did not receive the income it expected under these contracts.

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18/ Dec. 31, 1983, is the closing date for the Cape Flattery and Bear Creek 2 mitigation resale contracts.

The primary question involving these claimed damages is whether they are recoverable. The tribe and BIA argue that they are recoverable under Standard Provision B2.7, which states that "any costs or expenses" incurred because of the breach are recoverable. (Emphasis added.) As BIA and the tribe interpret this provision, Walch agreed in advance that all consequences emanating from a breach of these contracts that were susceptible to economic evaluation would be part of the measure of damages without regard to any existing contract law principles, such as foreseeability and mitigation. Furthermore, Walch allegedly agreed that the approving officer's determination of the amount of those damages would be conclusive unless that determination was made in bad faith.

[10] In the absence of a clear showing that Walch understood and accepted this interpretation of the provision, the Board declines to adopt BIA's and the tribe's arguments concerning the interpretation of the language in Standard Provision B2.7. Such an interpretation is too inconsistent with recognized general contract law to be adopted without positive evidence that all parties knew of and agreed to this construction. The language "any costs or expenses" will, therefore, be construed in accordance with general rules governing the determination of damages for breach of contract.

General contract law has accepted the principle of foreseeability since the historic case of Hadley v. Baxendale, 156 Eng. Rep. 145 (1845). This rule, as commonly followed, requires that the claimed damages must have arisen naturally from the breach itself without any intervening causes and must have been contemplated by the parties as a probable result of breach at the time of

contracting. See, e.g., J. D. Calamari and J. M. Perillo, Contracts § 206 at 330 (1970). The purpose of this rule is to prevent a breaching party from being held responsible for occurrences that were not directly related to the breach and to prevent the nonbreaching party from being unduly enriched. The principle recognizes that contract law attempts to do equity between the contracting parties, rather than to punish the breaching party.

The tribe and BIA allege that Walch knew at the time of contracting that the tribe would be relying on steady income from the logging of these two units. This allegation is based upon a statement made by Walch in a letter to the tribe during the period in which Walch was seeking assignment of VVP's original contract:

> I feel that I can prove to you a more equitable way to guarantee a constant income for the "Makah Reservation Members." Because the revenue derived from your timber sales are a primary source of income for all tribal members I feel my ideas are timely and of interest to all.

(Doc. #225, #1218). Neither the tribe nor BIA claims that the specific use to which the tribe intended to put this income was communicated to Walch, or that the consequences of failure to generate steady income were explained. Nothing in the contract package shows the intended use of the funds. According to post-breach representations made by BIA, the tribe intended these funds to finance the employment of approximately 150 tribal members. 19/

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19/ Doc. #355, #1342. Letter from Assistant Area Director (Economic Development) to Walch Logging, Inc., Sept. 17, 1980, at 1: "Unfortunately, due to your breach of contract the Makah Tribe has been placed in severe financial hardship and to enable continued employment of approximately 150 tribal members it is necessary that these contracts be sold at this time."

Walch states that it had no knowledge of the intended use of this income. Indeed, the letter upon which BIA and the tribe rely for the proposition that Walch knew of the tribe's need for steady income states Walch's concern with a source of income for the tribal members, not for financing tribal operations.

The tribe cites numerous cases in support of its position that interest is an allowable element of damages. The Board does not disagree that, under appropriate circumstances, interest may be a proper item of damage. However, as the Board interprets the cases cited in the briefs before it and in the tribe's justification of this item to appellees (Doc. #405, #1392), interest will be awarded when borrowing or liquidation of assets is required to finance the operations covered by the contract because of such factors as increased costs, delays in completion, or the necessity to secure other persons to complete the project. The Board knows of no case in which interest was allowed as an item of damage when the interest expense or loss was incurred in order to finance the continuation of operations totally unrelated to the contract and not specifically made known before the parties entered into the contract.

The Board finds that the administrative record does not show that Walch knew of the intended use of the revenues generated under these contracts and that Walch had no reason to foresee that the tribe would or might incur the claimed interest expenses as a result of the breach of these contracts. Furthermore, the tribe's decision to liquidate assets and to borrow money constituted an independent business judgment and was not a natural and inevitable result of the breach of contract. Therefore, the need to secure alternate funding for the financing of tribal operations was not a foreseeable

consequence of Walch's breach of these contracts and recovery of the claimed interest damages is denied. 20/

6. Liability of Dant & Russell.

The last major question in this case concerns the extent of the liability, if any, of Dant & Russell for damages incurred because of the breach of these contracts. The tribe and BIA contend that Dant should be held liable as a principal for the full amount of the damages. This contention is based upon a factual determination that Dant, rather than Walch, was in charge of the operations under the contracts, including the original assignment of the contracts from VVP to Walch, actual logging operations conducted on the sites, negotiations on contract modification, and the decision to breach the contracts.

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20/ The Board's conviction in the correctness of this conclusion is strengthened by two additional factors. First, under Standard Provision B6.12 liquidated damages are allowed for failure to make timely payments under the contracts. The liquidated damages provisions are, by their own terms, inapplicable unless specifically provided for in the negotiated sections of the contracts. Neither contract incorporated liquidated damages. Under these circumstances, it was reasonable for Walch to believe that no great harm would result from failure to provide a steady flow of revenue under the contracts. This conclusion is entirely consistent with the nature of the contracts which permitted logging to occur at those times most economically favorable, rather than steadily over the course of the contract year or term of the contract. Although the tribe was entitled to believe that income would be generated under the contracts, the contracts did not require a steady flow of income.

Furthermore, there is no indication in the administrative record that the tribe made any attempt to mitigate the claimed damages by laying off or furloughing employees, deferring payrolls, or taking any other measure that might reasonably be expected of an organization faced with loss of income. The general contract law principle that the non-breaching party is required to mitigate damages has already been discussed, supra.

Much of the argument for the tribe's and BIA's determination is based on a September 1, 1978, document between Walch, Dant, and VVP entitled "Log Sale Agreement" (Doc. #2178). This document was not discovered by either the tribe or BIA until May 10, 1982, following a Washington State civil case against Walch and Dant. Accordingly, the document was not before the approving officer at the time of the October 30, 1981, decision which is under consideration.

Dant maintains that it was at most an indemnitor on Walch's performance bonds. It argues that there is no evidence that it was more involved in the operations under these contracts and that the log sale agreement cannot be considered because it was not before the approving officer at the time of the decision.

[11] The true nature of the relationship between apparently separate business entities is a question of fact. See, e.g., Rhonda Coal Co., 4 IBSMA 124, 89 I.D. 460 (1982). The Board has, accordingly, carefully examined the documents cited by BIA and the tribe in support of their contention that a relationship different from the apparent one existed between the two businesses (Doc. #2000-#2207; #3001-#3004, being exhibits to the Answer Brief of the Makah Tribe).

Based upon these documents, the Board finds that BIA and the tribe both had reason to believe that Walch was not in control of the operations on the Cape Flattery and Bear Creek logging sites prior to the February 7, 1980, breach of the contracts. From these documents it appears both Walch and Dant

considered that Dant was responsible for handling all financial and administrative aspects of the contracts, including the payment of advances; Walch deferred to Dant in all decisions affecting day-to-day operations under the contracts; BIA foresters were told on numerous occasions by both Walch and Dant that they should deal directly with Dant rather than with Walch; in response to a BIA statement that it would continue to deal with Walch because it held the contract assignments, Walch wrote BIA making Dant its representative in all matters relating to the contracts; Dant employees were present at and dominated meetings with BIA and tribal representatives, including one meeting at which the Dant employees indicated that Dant would be making the decision whether or not the contracts would be breached.

Dant's involvement in the day-to-day operations in the field and in the financial and administrative aspects of the contracts belies its alleged "mere indemnitor" 21/ status and clearly and unmistakably shows that it, rather than Walch, was in control of the operations. The log sale agreement that was discovered after the declaration of breach simply clarifies and explains the actual nature of the relationship between Dant and Walch; it does not provide the only basis for the decision on the extent of Dant's involvement with and consequent liability under these contracts.

The Board finds that sufficient evidence exists to support the conclusion that Dant was the actual motivating force behind the Cape Flattery and

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21/ Black's Law Dictionary (Rev. 4th Ed. 1968) at page 910 defines "indemnitor" as "[t]he person who is bound, by an indemnity contract, to indemnify or protect the other." "Indemnity" is defined as:

"A collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being indemnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person."

Bear Creek contracts and should, therefore, be held equally liable with Walch for all damages resulting from the breach of those contracts. Therefore, the Board affirms BIA's finding that Dant should be held liable as a principal for the full amount of damages sustained as a result of the breach of the Cape Flattery and Bear Creek contracts. 22/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, modified in part, and reversed in part as indicated in this decision. The case is remanded to the Bureau of Indian Affairs for the recalculation of damages as required by this decision. 23/

//original signed
Wm. Philip Horton
Chief Administrative Judge

We concur:

//original signed
Jerry Muskrat
Administrative Judge

//original signed
Franklin D. Arness
Administrative Judge

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22/ The Board rejects Dant's contention that it is without authority to determine that Dant is liable as a principal on the timber contracts. While it is true that disputes involving agency questions commonly adjudicated by the Department have involved assertions by private parties, not the Government, that another party was lawfully acting on their behalf to perform deeds required by regulation or contract (see, e.g., Frederick C. Farrington, George M. Hoffman, 36 IBLA 70 (1978); Charlotte E. Brown, 70 I.D. 491 (1963); Lauren W. Gibbs, 67 I.D. 350 (1960); Earl C. Hartley, 65 I.D. 12 (1958); William G. Taylor, 60 I.D. 227 (1948), this does not mean that the Government may not raise the issue of agency in determining liability under Federally approved contracts. With respect to private sector dealings with Indian trust property, it would also seem incumbent upon the Secretary and his authorized representatives, in the exercise of their fiduciary responsibility, to know fully with whom trust property is being bargained and on what terms.

23/ Although Walch includes tables in its reply brief at 22, 24 that allege to show the IFA stumpage rates in effect for the periods after Oct. 23, 1980, these figures have not been shown to be accurate. Therefore, remand is required because these figures are known to the parties, but not to the Board.